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No. 92 - 1

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

LYNWOOD MOREAU, et al.,

PETITIONERS,

VS.

JOHNNY KLEVENHAGEN, et al.,

RESPONDENTS.

On Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

BRIEF AMICUS CURIAE OF THE TEXAS MUNICIPAL LEAGUE AND THE TEXAS CITY ATTORNEYS ASSOCIATION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

The Fair Labor Standards Act as amended provides that public employers may substitute compensatory time at the rate of not less than 1 1/2 hour for each hour of overtime worked in lieu of overtime pay in cash, provided that the compensatory time is pursuant to

> (i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or
>
> (ii) in the case of employees not covered by subclause (i), an agreement of understanding arrived at between the employer and employee before the performance of the work. [29 U.S.C. Section 207(o)(2)(A)].

Section 207(o) further specifies that

> In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). [29 U.S.C. Section 207(o)].

The question presented here is whether a public agency may reach an agreement regarding compensatory time with individual employees under subclause (ii) when the agency is barred by state law from reaching an agreement with a union representative under subclause (i).

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INTEREST OF AMICI CURIAE

The Texas Municipal League is a nonprofit association of over 960 Texas municipalities. The Texas City Attorneys Association, an affiliate of the Texas Municipal League, is an organization of attorneys who represent Texas municipalities. Amici curiae have a vital interest in this case because the decision of this Honorable Court has the potential for affecting the compensatory time structure currently in use in literally thousands of state and local governments throughout the State of Texas and the United States.

Amici Curiae respectfully submit this brief in support of the Respondents.

Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief amicus curiae. The parties' written consent documents have been filed with the Clerk of the Court.

SUMMARY OF THE ARGUMENT

Amici curiae contend that in light of the plain language of Section 207(o), the relevant federal circuit courts of appeal that have construed that language of Section 207, and

Texas' prohibition against public employers' recognition of labor organizations, the Fifth Circuit Court of Appeals' decision should be affirmed.

ARGUMENT

Section 207(o) of the Fair Labor Standards Act provides, in pertinent part:

> (1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate of not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.
>
> (2) A public agency may provide compensatory time under paragraph (1) only -
>
> (A) pursuant to -
>
> (i) applicable provision of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

(ii) in the case of employees not covered by subclause (i), an agreement of understanding arrived at between the employer and employee before the performance of the work; ...

In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii).

29 U.S.C. Section 207(o) (Supp. I 1992).

The issue in this case is whether a public agency may reach an agreement regarding compensatory time with individual employees under subclause (ii) when the agency is prohibited by state law from reaching an agreement with a union representative under subclause (i).

In addition to the Fifth Circuit's decision in this case, the Fourth, Tenth, and Eleventh Circuits have construed the language of Section 207(o). The Tenth Circuit opinion, however, is not instructive in this case because the Tenth Circuit case did not involve a state in which state law

prohibits a public employer from bargaining with an employee representative.

I. Federal Case Law

A. The Fourth Circuit

In *Abbott v. City of Virginia Beach*, a police officers association and 126 police officers in the Virginia Beach Police Department challenged the Department's compensatory time policy, alleging it violated the Fair Labor Standards Act. *Abbott v. City of Virginia Beach*, 879 F.2d 132 (4th Cir. 1989), *cert. denied*, 110 S.Ct. 854 (1990). The Department policy was to allow each officer to choose whether to receive his overtime compensation in money or compensatory time off or any combination thereof. The police officers claimed that this policy violated the FLSA, Section 207(o) because the Department refused to negotiate an agreement with the officers' designated FLSA representative, and promulgated the policy unilaterally. The police officers argued that the lower court had erred in interpreting the term "representative," and that any designee of the employees is a representative, whether recognized or not, and that compensatory time cannot be substituted with cash for overtime unless an agreement is reached with the representative. The police officers also argued that the employer could not reach individual agreements with employees who have made the designation to have a representative, such that the employee must be

compensated with cash for overtime in absence of an agreement.

In analyzing the case, the Fourth Circuit recognized that Virginia law prohibited the Department from collectively bargaining with representatives of its employees. The issue, in the words of the Fourth Circuit, was

> whether section 207(o) permits public employers to enter into individual agreements with its employees to provide compensatory leave in lieu of money for overtime where state law prohibits the employer from entering into agreements with employee representatives.

Abbott v. City of Virginia Beach, 879 F.2d 132, at 135. Citing the Secretary of Labor's expressed intent not to preempt state law and the House Report's statement that the purpose of section 207(o) was "to provide flexibility to state and local government employers and an element of choice to their employees regarding compensation for statutory overtime hours worked by covered employees," the Fourth Circuit held that "public employers may enter into *individual* agreements with its employees where state law prohibits agreements with employee representatives." *Abbott v. City of Virginia Beach*, 879 F.2d 132, at 136-137. (Emphasis added).

In *Wilson v. City of Charlotte*, the union member fire fighters of the Charlotte Fire Department challenged the Departments' policy of providing the fire fighters with compensatory time instead of cash payment for overtime hours worked. *Wilson v. City of Charlotte*, 964 F.2d 1391 (4th Cir. 1992). The Union argued that the Department's policy violated Section 207(o) of the Fair Labor Standards Act because the Department could not provide compensatory time for overtime worked without first reaching an agreement with the representative of the fire fighters. Without an agreement, the Union contended that the Department was required to pay cash for all overtime worked. The Department did not bargain with the union because North Carolina law prohibits contracts between governmental entities and labor unions.

In *Wilson*, the Fourth Circuit held that the Department was under no duty to reach an agreement with the union because the Department was prevented by state law from recognizing the union as the representative of the employees for purposes of Section 207(o) of the Fair Labor Standards Act. Thus, the court held that subclause (i) was not applicable. The Fourth Circuit found subclause (ii) to be applicable in determining whether the Department could substitute compensatory leave in lieu of cash for overtime worked. The court held that there was an

agreement under subclause (ii) because the employees were hired prior to April 15, 1986, and the practice in place on April 15, 1986 comprises the agreement between the employer and the employes.

B. The Eleventh Circuit

In *Dillard v. Harris*, the employees of a state hospital brought an action contending that the Georgia state hospitals violated the Fair Labor Standards Act by adopting a policy of providing compensatory leave in lieu of overtime pay without an agreement with the employees' representative. *Dillard v. Harris*, 885 F.2d 1549 (11th Cir. 1989), *cert. denied*, 111 S.Ct. 210 (1990). The Eleventh Circuit Court of Appeals indicated that the "critical fact" in the case was that Georgia law prohibited the employer from entering into an agreement with the representative of the employees. *Dillard v. Harris*, 885 F.2d 1549, at 1551. The Court found the Section 207(o) to be unambiguous on its face, and stated:

> it appears clear that the prerequisite for employees being "covered under subclause (i)" is an agreement or understanding between the employer and the employees' representative. Since the employees here had no agreement or understanding under subclause (i), they were not "covered" by it and thus were covered by subclause (ii).

Dillard v. Harris, 885 F.2d 1549, at 1552-53.

The court went on to hold, because the employees have no representative able to bargain over compensatory time, that

> the plaintiff employees were *not* covered by subclause (i) of section 207(o)(2)(A), and as a result *were* covered by subclause (ii). Under section 207(o)(2)(B), the practice in effect on April 15, 1986 constituted an agreement with respect to compensatory time, absent any contrary agreement between an employee and the state employer. Under that practice, the State's use of compensatory time was proper. (Emphasis in original).

Dillard v. Harris, 885 F.2d 1549, at 1556.

D. The Tenth Circuit

In *International Association of Fire Fighters, Local 2203 v. West Adams County Fire Protection District*, the Tenth Circuit Court of Appeals was asked to interpret Section 207(o)(i) and (ii) of the Fair Labor Standards Act. *International Association of Fire Fighters, Local 2203 v. West Adams County Fire Protection District*, 877 F.2d 814 (10th Cir. 1989). Amici curiae contend, however, that the *West Adams* case is not relevant because of the factual differences between the case at bar and the *West Adams* Case.

The fatal difference is that the *West Adams* case did not involve any state law that precludes a public agency from entering into agreements with representatives of employees of that public agency. This factual difference is key to the question presented in the case at bar. Therefore, the *West Adams* case is distinguishable and provides no authority for the Petitioner's contentions in this case.

II. Texas Law

Article 5154c prohibits any political subdivision of the State of Texas from entering into a collective bargaining agreement with a labor organization unless the political subdivision has adopted, through an election, the Fire and Police Employee Relations Act. TEX. REV. CIV. STAT. ANN., Art. 5154c (Vernon 1987); TEX. REV. CIV. STAT. ANN., Art. 5154c-1 (Vernon 1987). Harris County has not adopted the Fire and Police Employee Relations Act. Therefore, Harris County is prohibited by Texas law from bargaining with the union on the issue of compensatory time or any other issue.

III. The Case at Bar

In the case at bar, the facts are clear. The employees of the Sheriff's Department designated a representative for purposes of Section 207(o) of the Fair Labor Standards Act. Texas law prohibits Harris County from entering into

agreements with labor organizations because the Fire and Police Employee Relations Act has not been adopted in Harris County. The labor organization cannot, therefore, be a representative for purposes of the Fair Labor Standards Act, and therefore there cannot be an agreement entered pursuant to Section 207(o)(2)(A)(i). Harris County had established a compensatory leave system because of the practice in place on April 15, 1986, and the agreements entered into individually with employees hired after April 15, 1986. Thus, the compensatory time system provided for by Harris County complies with Section 207(o) of the Fair Labor Standards Act.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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